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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B5

DATE: AUG 0 9 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a postdoctoral fellow at the House Research Institute (formerly House Ear Institute, or HEI), Los Angeles, California. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief and new exhibits.

Before the filing of the appeal, attorney [redacted] in represented the petitioner. [redacted] prepared a response to a request for evidence (RFE), including a cover letter on [redacted] letterhead. The Cerritos, California, return address on the RFE response belongs to [redacted] rather than to the petitioner. Subsequently, however, [redacted] did not prepare or sign the Form I-290B Notice of Appeal; the petitioner's personal statement on appeal includes no mention of legal representation; and the petitioner mailed the appeal from Buena Park, California, where he resides. Form I-290B advises that attorneys "must attach a Form G-28, Notice of Entry of Appearance as Attorney or Representative" to the appeal, as required by the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 292.4(a). The appeal does not include this form. Therefore, the record contains no indication that [redacted] is still the petitioner's attorney of record, and several indications that he is not. The AAO will therefore consider the petitioner to be self-represented, and the term "prior counsel" shall refer to [redacted]

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's

> services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now USCIS] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the

professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on March 14, 2011. In an accompanying introductory letter, prior counsel stated:

> [The petitioner's] research has always been concentrated on research issues more relevant to national needs than are the typical academic projects. His current research is on human hearing loss at House Ear Institute (HEI). . . . Specifically, he is investigating the mechanism of binaural hearing with cochlear implant, a medical device that . . . allow[s] some deaf individuals to learn to hear and interpret sounds and speech. The ultimate goal of his research endeavor is to enhance speech recognition performance of listeners with hearing loss.

Prior counsel asserted that the petitioner is "[a] researcher with documented accomplishments, thus a considerable degree of influence in the scientific community," who "is uniquely qualified to contribute to the national interest."

Five witness letters accompanied the petition. [redacted] was the petitioner's dissertation committee chair and research adviser at the University of Illinois, where [redacted] is an associate professor. [redacted] stated:

> [The petitioner] was an integral part of and played an important role in our research group, which is internationally known for innovative solutions to search for perceptual cues for consonant recognition for normal and hearing-impaired listeners.
>
> [The petitioner] has been instrumental in developing methods for quantitative evaluation of consonant perceptions measured from hearing-impaired listeners. . . . He represented our group at [professional] meetings. . . . [The petitioner's] contributions to our research efforts were unique because he was the only graduate student that came from the Speech and Hearing Department whereas all our other students came from the School of Engineering. Thus he had a unique and crucial hearing perspective that was essential for our group's research efforts.
>
> In my opinion, [the petitioner] is a promising young scientists [*sic*] with expertise in speech perception for patients with hearing difficulty as it is directly related to health and biomedical sciences, which is one of the major focuses the NIH pursues in [the] 21st century. In particular, he is one of the few who have developed expertise in consonant confusion analysis and its utility for hearing aid and cochlear implant technology.

[redacted] stated:

[The petitioner] worked in my department as a post doctoral associate from June, 2008 to June, 2009.

[The petitioner] was a valuable member of our research team that worked on the development of several important protocols and devices for better hearing and for better assessment of speech communication ability. One of the projects was the development of a direct connect (DC) test instrument for clinical assessment of the benefits of the cochlear implant (CI). . . .

He conducted laboratory validation studies with 15 CI users to establish the relationship between results obtained with the DC instrument and results obtained from sound field tests. [The petitioner] also performed laboratory studies with 50 normal hearing subjects to establish the norms for each measure of performance used in the protocol. . . .

[The petitioner] has also been involved in the development of an automatic speech recognition (ASR) system that can be used in clinical and occupational settings to automatically assess an individual's speech communication ability. This ASR system is used with the Hearing In Noise Test (HINT). . . . [The petitioner's] research focused on the feasibility of using ASR technology to administer and score the HINT automatically.

[redacted], stated:

[The petitioner] decided to continue his research on cochlear implants as a post-doc research scientist in my group after the retirement of [redacted] two years ago. In the past two years, [the petitioner] has been one of the key members of our research group, and his essential contributions enabled our projects to achieve major progress in bilateral and bimodal cochlear implant research within a short time. . . .

The main focus of [the petitioner] in the last few years is to characterize the binaural benefits of cochlear implant patients with either two cochlear implants or one cochlear implant combined with a hearing aid. . . . [The petitioner] revealed that large differences in auditory processing between ears may reduce binaural benefit, and that binaural benefit depends more strongly on the listening environment than on the speech materials. [The petitioner] also tried to identify the speech information processed by a hearing aid that is additive to the information processed by a cochlear implant in noise and quiet. He found that the aided pure-tone threshold is an important factor and should be carefully used in order to maximize the advantage of the bimodal use in speech perception. Importantly, the bimodal listening mode enhanced the transmission of both low and high frequency components in speech. In addition to performing outstanding research, [the petitioner] also helped other group members with many speech analysis and processing tools.

> . . . [The petitioner] is skilled in speech signal processing and digital signal processors. During his post-doc research in our group, [the petitioner] becomes an exceptional expert in cochlear implants, human speech perception, and auditory psychophysics research. These rarely found multidisciplinary skills are essential to [the petitioner's] success in research on cochlear implants and set him apart from other researchers with a similar background in the same field.

[redacted] states:

> [The petitioner's] present work is to understand the mechanism for binaural (hearing with two ears) benefit in speech recognition for bilateral CI users. . . . [The petitioner's] research will also lead to a better understanding of binaural processing in electric hearing, which provides a great potential for better speech perception, particularly in noise. . . .
>
> Few studies have been conducted to investigate the effects of asymmetric or symmetric performance on the bilateral advantage in electric hearing. The functional relationship between bilateral advantage and the performance difference between ears remains unclear. Evaluating such a relationship is important because the mechanism of bilateral auditory benefit may be related to this relationship. [The petitioner's] recent manuscript (accepted with minor revision at the *International Journal of Audiology* quantified this relationship. . . .
>
> Another area of [the petitioner's] research, a search for the source of the bimodal hearing (CI on one hear [*sic*] and HA on the other ear), is also important. . . . When the benefit of bimodal hearing in speech recognition is addressed, the audiometric threshold of the acoustic ear should be considered as a covariate. . . . The results of [the petitioner's] study (accepted for publication [in] the *Journal of Speech Language Hearing Research*) suggest . . . that aided hearing thresholds should be carefully used in order to maximize the advantage of the bimodal use in speech perception. . . .
>
> [The petitioner's] combination of knowledge and skills in behavioral measure [*sic*] and engineering is rare to find among his peers.

The only initial witness to have no evident connection to the petitioner or [redacted] associate professor at Ohio State University. [redacted] stated: "One of [the petitioner's] most substantial contributions thus far has been the development of a method to analyze confusions associated with the basic units of American English (consonants)." [redacted] credited the petitioner with collecting "data [that] . . . have furthered our understanding of temporal processing deficits in hearing-impaired listeners, which in turn can lead to the development of cochlear implant processors that are better able to handle temporal information. This has the potential to ultimately improve speech recognition, particularly in noise." [redacted] added:

> In addition to these contributions, [the petitioner] contributed to a relatively new remedy for hearing loss: Acoustic/Electric Stimulation (EAS) [*sic*]. The majority of the 36 million Americans with hearing loss have their greatest deficits in the high-frequency region. In this case, significant benefit in speech perception can be obtained by combining acoustic stimulation in the low-frequency region through a hearing aid and electric stimulation in the higher frequency region through a cochlear implant. The often dramatic improvement in speech intelligibility when adding acoustic and electric stimulation occurs even though the acoustic stimulation alone often provides little or no intelligibility.
>
> I reviewed [the petitioner's] research manuscript as Associate Editor for the Journal of Speech-Language Hearing Research. [The petitioner] provided a further examination of the benefit of EAS, with regard to the particular speech cues involved. The results suggest that voicing cues are more important than other researchers have argued, because it may be the most robust of the cues available. [The petitioner] also argued that another cue, first and second resonant frequencies, contributes significantly to the EAS benefit. This is an important finding because it is generally believed that these cues cannot be transmitted by the EAS configuration.

The petitioner's *curriculum vitae* identified three published articles and three manuscripts submitted for publication in various journals, along with numerous conference presentations. The petitioner submitted copies of the published articles and several conference abstracts.

The petitioner submitted a copy of an electronic mail message, inviting the petitioner to review a manuscript submitted to *IEEE Transactions on Biomedical Engineering*. The author of the electronic mail message is longtime HEI researcher Prof. [redacted] whose awareness of the petitioner's work does not indicate a reputation or influence beyond [redacted] itself.

On June 22, 2011, the director issued a request for evidence, instructing the petitioner to "submit copies of any published articles by other researchers citing or otherwise recognizing" the petitioner's published work, as well as "additional documentary evidence" of eligibility for the waiver. In response, the petitioner submitted a copy of one citing article – co-authored by Prof. [redacted] – accepted for publication ten days before the filing date, and published in June 2011. The citation was part of an aggregate citation. To support the assertion that "BiCI users show a wide range of sensitivities to interaural timing differences (ITD) that at best are still poorer than NH listeners," Prof. [redacted] and his co-authors cited eight articles, including the petitioner's article. The earliest cited article in the group citation dated back to 1993. This single citation does not indicate that the petitioner's work stands out from that of other qualified researchers.

Prior counsel stated that "peers have made request [*sic*] for [the petitioner's] published work or work in progress," and implied that these requests are somehow comparable to citations. On April 27, 2011, [redacted] sent the petitioner an electronic mail message that read:

> I do remember that your research interests were closely aligned to those of my laboratory. Please drop me a note to let me know what new knowledge you found in bilateral and bimodal areas you are pursuing. Please send us your IJA bilateral and JSLHR bimodal papers you might have, and give my best to [redacted]

Prof. [redacted] presumably referred, above, to [redacted] It is clear from the above wording that Prof. [redacted] was not yet aware of the results of the petitioner's latest work. Rather, he inquired as to "what new knowledge" came from those endeavors. Prior counsel failed to explain how such an inquiry is comparable to citation (in which a researcher is already aware of given information, and repeats that information while identifying its source).

A May 6, 2011, message from [redacted] jointly addressed to the petitioner and two co-authors, read:

> I am a PhD student at the University of Southampton. I read your paper . . . and found it very interesting. The use of interaural time and level difference cues by bilateral cochlear implant users [*sic*]
>
> Do you have the head related impulse responses in which the receivers are the microphones of cochlear-implant processors? If you have it could you please send it to me?

The intent behind the sentence fragment at the end of the first quoted paragraph is not clear. The second paragraph is not a commentary on the petitioner's work, but rather a request for information about, and data from, experiments that the petitioner's group conducted. The petitioner did not show that this request, from nearly two months after the petition's filing date, indicates a demonstrable achievement with some degree of influence on the field as a whole as of that filing date. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request. 8 C.F.R. § 103.2(b)(1).

The petitioner submitted documentation showing acceptance of additional papers for publication, and more invitations to perform peer review, after the petition's filing date. This evidence shows the petitioner's continued activity as a researcher and peer reviewer, but the existence of these materials is not, itself, presumptive evidence of eligibility for the waiver.

A new letter from [redacted] read, in part:

> Recently I reviewed [the petitioner's] research manuscript . . . as an associate editor for *the Journal of Acoustical Society of America – Express Letters*. This work was of outstanding quality and one of the more straightforward editorial assignments that I've had for a while. . . . This topic is important because the insertion depth achieved across ears in bilateral cochlear implant may be different. Hence there are binaural mismatches in frequency across ears, leading to distortion of speech information, resulting in different speech patterns for each ear. This spectral mismatch that is

attributed to different insertion depths might be one of the sources of variability in binaural benefits for bilateral cochlear implant users.

. . . Based on [his] findings, [the petitioner] argued that binaural benefit was more dependent on the presence of similar speech information than similar unilateral performances across ears. This distinction is important for two reasons. This finding provides supporting evidence for an existing binaural mechanism for normal hearing, redundancy, referring to hearing identical information at each ear. This finding also provides a basis for excluding a possible integration mechanism, referring to combining different speech information from each ear for binaural mechanism in bilateral cochlear implants. This study theorized the binaural mechanism for bilateral cochlear implant uses. Clinically this result suggests that the binaural benefit can be maximized by optimizing both cochlear implants to provide similar patterns of speech information, not optimizing each cochlear implant for better performance.

As a young scientist, [the petitioner] has great potential to generate new knowledge and approaches for better understanding perceptual mechanisms for binaural electric hearing.

The director denied the petition on September 12, 2011. The director stated:

The submitted evidence does not set the self-petitioner apart from other researchers in his field. The evidence shows the self-petitioner has accomplished what most other researchers accomplish; that is produce published articles, present findings at conferences, and peer-review journal articles.

. . . It can be expected that if the self-petitioner's published research was truly significant, it would be widely cited. . . .

[N]one of the letters mention the self-petitioner's research has actually had an impact and where it had an impact. Rather, the letters speak of the potential of the self-petitioner's findings and research. The self-petitioner's findings do not appear to have yet had a measurable influence in the larger field.

On appeal, the petitioner states:

Although my career is in a relatively early stage, I am quickly gaining respect and acceptance in my field.

- My published work has been recognized in a very short period of time by peers either in the form of citation, online downloads, requests for published works, or strong letters of support.
- I am one of the most productive researchers at the House Research Institute. This year, I have published four articles, submitted three manuscripts for

> publication, and prepared two manuscripts. This is clearly an outstanding accomplishment in . . . comparison with others in the same early career stage.
> - I have been invited to review for three international journals in my field, including the *Journal of Acoustical Society of America – Express Letter*, . . . 'the leading source of theoretical and experimental research results in the broad interdisciplinary subject of sound."

The petitioner submits a printout of the "Top 20 Most Downloaded Articles" from the *Journal of the Acoustical Society of America* for August 2011. An article by the petitioner is tenth on the list. Nearly all of the listed articles are among the newest articles to appear in that journal. Eighteen of the 20 articles, including the petitioner's article, appeared in Volume 130, Issue 2 of the journal. (The article at the top of the list dates from 1993; the article at the bottom is from the recent Volume 129, Number 6.) It appears that the heavy downloading of these articles owes more to their recent publication than to their intrinsic significance. In other words, it appears that researchers download new articles as they appear, meaning that, at any given time, the most-downloaded articles will also tend to be the newest.

The only new citation evidence submitted on appeal consists of two unpublished student papers: a master's thesis from Dalhousie University, and a doctoral dissertation from the University of Illinois. The latter paper repeatedly cited an article that the petitioner wrote with [redacted] under whom he had studied at the University of Illinois.

The petitioner also submits messages containing additional requests for copies of his published or presented work. Because these requesters have not yet seen the work they are requesting, such requests are not persuasive evidence of the impact of the petitioner's work. The petitioner submits nothing on appeal to show that the number of requests, or of citations in dissertations and theses, is particularly high.

The petitioner states that the appeal includes two new witness letters, but the record contains only one such letter. [redacted], identified earlier, describes the petitioner's recent research findings and concludes:

> [The petitioner's] finding is significant theoretically because it can explain why the level of the residual hearing threshold is poorly associated with the bimodal benefit and because it might provide an explanation for variability in bimodal benefit across subjects. As a clinical application, it is possible to develop a clinical protocol to predict who will or will not benefit from bimodal fitting.

The petitioner states that the second letter on appeal is from [redacted] CEO of House Research Institute. The petitioner calls [redacted] an "independent" witness, although he is a top executive of the petitioner's employer. [redacted] letter appears to be missing from the record. The petitioner describes a letter that is similar to others in the record, including Prof. [redacted] new letter. For example, the petitioner states that [redacted] letter indicates that the petitioner's "finding is also significant clinically because (1) it will provide a basis for predicting who will benefit from bimodal hearing, and (2) also provide a rehabilitation framework for better bimodal

benefit." This assertion, which the petitioner attributes to [redacted], reads like a close paraphrasing of [redacted] letter. Thus, the petitioner's own description of [redacted] letter does not indicate that the letter would have added much of substance if it were present in the record.

The Board of Immigration Appeals (BIA) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The BIA also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

The opinions of experts in the field are not without weight and have received consideration above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as above, evaluate the content of those letters as to whether they support the alien's eligibility. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Most of the witnesses have worked with the petitioner or with his mentors. The witnesses have offered explanations as to how the petitioner's research represents an important advance in the field, but the record contains little evidence that the petitioner's work had a significant impact or influence on the field at the time he filed the petition in March 2011. The assertion that the influence will become evident at a later date amounts to speculation. The record contains no evidence that the petitioner's findings have had a practical impact on treatment protocols for hearing-impaired patients. Assertions about the potential impact of the petitioner's findings have little weight without evidence that the potential has been realized.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.